TM Feroze Khan & Ors v Meera Hussain bin TM Mohamed Mydin

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO P-02-372 OF 1996
SHAIK DAUD, ABDUL MALEK AHMAD AND DENIS ONG JJCA
2 OCTOBER 1997

Civil Procedure *— Want of prosecution — Striking out action for want of prosecution — Delay on the part of the plaintiff to take out summons for directions — Whether delay intentional and contumelious — Whether court should exercise discretion to allow application — Rules of the High Court 1980 O 25 r 1(1)(b)*

The appellants had filed a writ of summons on 15 January 1993 and had subsequently obtained an injunction against the respondent. The respondent's statement of defence was admitted on 22 June 1995, at which date the pleadings were deemed to be closed. Order 25 r 1(1)(b) of the Rules of the High Court ('the RHC') provides that the plaintiff must take out a summons for directions within one month after the pleadings in the action are deemed to be closed or the defendant may apply for an order to dismiss the action. Therefore, the summons for directions should have been taken out by the appellants on or before 21 July 1995, which they failed to do. Nine months thereafter, the respondent wrote to the appellants requesting them to take out the summons for directions within seven days, failing which the respondent's solicitors would apply for the action to be struck out for want of prosecution. Instead of complying with this, the appellant applied for consolidation to hear another matter together with their action. The High Court dismissed the appellants' writ of summons and statement of claim for want of prosecution on the ground that the appellants breached O 25 r 1(1)(b) of the RHC. The appellants appealed.

Held, dismissing the appeal:

The trial judge has the sole discretion on whether to grant or refuse an application to strike out an action for want of prosecution. There is a presumption that the judge has rightly exercised his discretion and the appellate court should not readily interfere with such an exercise of discretion. An appellate court could only review questions of discretion if it is clearly satisfied that the judge was wrong.

On the facts, there was a deliberate long delay by the appellants. This delay had prejudiced the respondent in that he had an action hanging over his head indefinitely, without knowing when it would go to trial. Furthermore, the appellants, having obtained the injunction and caveated the property, appeared to be satisfied with not proceeding to trial. The wait for consolidation, given by the appellants as an excuse for the delay, was a lame one because they could have applied for consolidation in the summons for directions itself. There was, therefore, no bona fide reason for not applying for a summons for directions. As such, the trial judge was justified in exercising his

A discretion to strike out the action. There was no reason to interfere with the exercise of that discretion and the appeal was, thus, dismissed accordingly (see pp 803G–I and 804E–I); *Vasudevan v T Damodaran & Anor* [1981] 2 MLJ 150, *Toh Hock Thye & Ors v Toh Chwee Biow* [1982] 1 MLJ 152, *Lim Heng Hoo v Tan Hock Hai & Ors* [1974] 1 MLJ 101 and *Hongkong Bank (M) Bhd v Raja Letchumi a/p Ramarajoo & Ors* [1996] 2 MLJ 34 followed.

B

[Bahasa Malaysia summary

Perayu-perayu telah memfailkan suatu writ saman pada 15 Januari 1993 dan berikutnya telah memperolehi injunksi terhadap penentang. C Pernyataan pembelaan penentang dimasukkan pada 22 Jun 1995, di tarikh mana pliding dianggap telah tutup. Aturan 25 k 1(1)(b) Kaedah-Kaedah Mahkamah Tinggi ('KMT') memperuntukkan bahawa plaintif mestilah mengambil suatu saman untuk arahan dalam tempoh sebulan selepas pliding dalam tindakan dianggap tutup atau D defendan boleh memohon untuk suatu perintah bagi membatalkan tindakan. Maka, saman untuk arahan seharusnya diambil oleh perayu-perayu pada atau sebelum 21 Julai 1995, yang tidak dilakukan. Sembilan bulan selepas itu, penentang telah menulis kepada perayu-perayu meminta mereka supaya mengambil saman untuk arahan dalam tempoh tujuh hari, dan sekiranya gagal berbuat demikian E peguamcara penentang akan memohon supaya tindakan dibatalkan akibat ketiadaan pendakwaan. Perayu tidak mematuhi permintaan ini; sebaliknya dia memohon untuk penggabungan supaya perkara lain didengar bersama dengan tindakan mereka. Mahkamah Tinggi telah menolak writ saman perayu-perayu dan pernyataan tuntutan F akibat ketiadaan pendakwaan atas alasan bahawa perayu-perayu telah melanggar A 25 k 1(1)(b) KMT. Perayu-perayu membuat rayuan.

Diputuskan, menolak rayuan:

Hakim perbicaraan mempunyai budi bicara tunggal tentang sama ada untuk memberi atau menolak permohonan untuk membatalkan G tindakan akibat ketiadaan pendakwaan. Terdapat anggapan bahawa hakim telah melaksanakan budi bicara dengan betul dan mahkamah rayuan tidak patut mengganggu pelaksanaan budi bicara itu. Sesebuah mahkamah rayuan hanya boleh mengkaji semula persoalan budi bicara seandainya ia puas hati bahawa hakim terkhilaf.

H Atas fakta-fakta, terdapat kelewatan terlampau yang disengajakan oleh perayu-perayu. Kelewatan ini telah memudaratkan penentang dalam ertikata penentang terlibat dalam tindakan yang belum diputuskan untuk tempoh yang tidak tentu, tanpa mengetahui bilakah ia akan dibicarakan. Selanjutnya, selepas memperolehi injunksi dan mengkaveatkan harta tersebut, perayu-perayu nampaknya puas dengan I keputusan untuk tidak meneruskan perbicaraan. Tempoh menunggu untuk penggabungan, yang diberikan oleh perayu-perayu sebagai alasan untuk kelewatan, adalah alasan yang tidak munasabah kerana mereka seharusnya boleh memohon untuk penggabungan dalam saman untuk arahan itu sendiri. Dengan itu, tiada sebarang alasan

bona fide untuk tidak memohon untuk saman untuk arahan. Oleh itu, hakim perbicaraan adalah berjustifikasi dalam melaksanakan budi bicara beliau untuk membatalkan tindakan. Tiada sebarang sebab untuk mengganggu pelaksanaan budi bicara itu dan justeru itu rayuan ditolak (lihat ms 803G–I dan 804E–I); *Vasudevan v T Damodaran & Anor* [1981] 2 MLJ 150, *Toh Hock Thye & Ors v Toh Chwee Biow* [1982] 1 MLJ 152, *Lim Heng Hoo v Tan Hock Hai & Ors* [1974] 1 MLJ 101 dan *Hongkong Bank (M) Bhd v Raja Letchumi a/p Ramarajoo & Ors* [1996] 2 MLJ 34 diikut.]

Notes

For cases on striking out actions for want of prosecution, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 3649–3654.

Cases referred to

Hongkong Bank (M) Bhd v Raja Letchumi a/p Ramarajoo & Ors [1996] 2 MLJ 34 (folld)
Lim Heng Hoo v Tan Hock Hai & Ors [1974] 1 MLJ 101 (folld)
Ratnam v Cumarasamy & Anor [1965] 1 MLJ 228 (refd)
Toh Hock Thye & Ors v Toh Chwee Biow [1982] 1 MLJ 152 (folld)
Vasudevan v T Damodaran & Anor [1981] 2 MLJ 150 (folld)

Legislation referred to

Rules of the High Court 1980 O 25 r 1(1)(b)

Appeal from: Civil Suit No 22–19–1993 (High Court, Penang)

Hamid Sultan bin Abu Backer (*Hamid Sultan & Rakan-Rakan*) for the appellants.
Abu Haniffa Md Abdullah (*Syarikat Abu Haniffa*) for the respondent.

Cur Adv Vult

Shaik Daud JCA (delivering the judgment of the court): This is an appeal from the decision of the Penang High Court which had on 30 May 1996 dismissed the appellants' writ of summons and statement of claim for want of prosecution on the ground that the appellants had not set down the matter for trial pursuant to O 25 r 1(1)(b) of the Rules of the High Court 1980 ('the RHC') within one month from the close of pleadings.

The four appellants, of whom three are outside the jurisdiction of the court, filed a writ of summons and statement of claim on 15 January 1993 for various declaratory judgments against the respondent. The facts leading to the filing of the writ are that the appellants and respondent are children of one Mohamed Mydin Merican, now deceased, having died on 12 October 1991. The deceased was the legal owner of a parcel of land known as Lot 465, Sek 11-W Daerah Timur Laut, Georgetown Pulau Pinang with nine houses erected thereon. On or about 2 February 1968, the said Mohamed Mydin Merican, during his lifetime, transferred the said property as a gift to the respondent, who was then eight years old. At the same time,

A the deceased created a trust deed, declaring a trust in favour of the respondent. Upon the death of the deceased, the respondent applied by an originating summons for a vesting order of the said property on himself. The appellants through their solicitors filed the said writ, and also obtained an injunction restraining the respondent from disposing of the said property. The grounds relied upon by the appellants are that they are beneficiaries of the B said estate of the deceased, and that the said property fails as a gift under Islamic Law and therefore the appellants are entitled to a share in the said property and that an injunction is necessary to maintain the status quo.

The respondent filed a summons in chambers on 31 March 1993 for an order that the injunction granted on 16 January 1993 be set aside which C application was dismissed. The respondent then filed their statement of defence on 14 April 1994 and thereafter on 21 April 1994, an amended statement of defence.

Pursuant to O 25 r 1(1)(b) of the RHC, in all actions begun by writ, the plaintiff must, within one month after the pleadings in the action are D deemed to be closed, take out a summons for directions, failing which sub-r (4) provides that the defendant may do so or may apply for an order to dismiss the action. The record of appeal shows that on the application of the respondent, the court had on 22 June 1995 admitted the statement of defence and the amended statement of defence which were filed on 14 April 1994 and 21 April 1994 respectively. Therefore, for all intents and purposes, E the pleadings were deemed to have been closed on 22 June 1995. The summons for directions should, therefore, have been taken out by the appellants on or before 21 July 1995. It is not disputed that the appellants failed to do so. Nine months thereafter, on 8 March 1996, the respondent's solicitors wrote to the appellants' solicitors requesting them to take out the F summons for directions within seven days failing which the respondent's solicitors would apply for the action to be struck out for want of prosecution. Having been so reminded, the appellants again failed to do so. Instead of acceding to the request, the appellants made an application by summons in chambers for an Originating Summons No 24–553–92 to be heard together with their action. On 30 March 1996, the respondent filed this G summons in chambers to strike out the appellants' action.

Whether to grant or refuse an application to strike out an action for want of prosecution is solely the discretion of the trial judge. It is a well-settled principle that an appellate court should not readily interfere with such an exercise of discretion. The Federal Court in *Vasudevan v* H *T Damodaran & Anor* [1981] 2 MLJ 150 stated that it will not interfere with the exercise of discretion of a trial judge in an application to have the action dismissed for want of prosecution. An appellate court can review questions of discretion if it is clearly satisfied that the judge was wrong but there is a presumption that the judge has rightly exercised his discretion and the appellate court should not readily interfere. This statement of law I was accepted by another Federal Court case of *Toh Hock Thye & Ors v Toh Chwee Biow* [1982] 1 MLJ 152, also a case of striking out an action for want of prosecution. (See also the Privy Council decision in *Ratnam v Cumarasamy & Anor* [1965] 1 MLJ 228). In *Lim Heng Hoo v Tan Hock Hai & Ors* [1974] 1 MLJ 101, the plaintiff therein failed to take out

summons for direction seven months after the pleadings had closed and the defendant applied for the action to be struck out for want of prosecution. The trial court allowed the application and the appeal to the Federal Court was dismissed. In *Toh Hock Thye & Ors v Toh Chwee Biow*, the Federal Court laid down the law (at p 153) applicable to this particular issue as follows:

> ... We propose for the purpose of this appeal to state the principle which would guide us in deciding this appeal to be thus — that the plaintiff's action is liable to be dismissed for want of prosecution when the court is satisfied that:
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> (1) the plaintiff's default has been intentional and contumelious or,
>
> (2) the plaintiff or his lawyer is guilty of such an inordinate or inexcusable delay that the defendant has been prejudiced by it ... .

In the present case, the learned judge exercised his discretion after taking into consideration all relevant matters, especially the history of the action. It must also be remembered that there was already a considerable delay, even before the issue of the writ, of about 24 years, that is after the registration of the transfer in favour of the respondent. Then, there was a further delay of nine months after the issue of the writ. The respondent kindly gave the appellants another opportunity to remedy their default by sending the reminder letter of 8 March 1996 and yet they failed to comply. This failure, in our view, is contumelious.

There is, therefore, no doubt there was this long delay, and a deliberate one at that. It only remains for consideration whether such delay has prejudiced the respondent. In our view, it undoubtedly has. There is much prejudice to a defendant in having an action hanging over his head indefinitely, not knowing when it is going to be brought to trial (see *Hongkong Bank (M) Bhd v Raja Letchumi a/p Ramarajoo & Ors* [1996] 2 MLJ 34). Added to this is the fact that the appellants had obtained an injunction restraining the respondent from dealing with his own property and had also caveated the property. Having obtained the injunction and caveated the property, the appellants appear to be satisfied not to proceed to trial. From this, it can be inferred that the primary purpose of filing the writ appear to be a vehicle to obtain the injunction.

The reason given for the delay was that the appellants were waiting for their application for consolidation of the present action with an earlier matter to be approved by the court. We find this reason to be a lame excuse as in the summons for directions itself, the appellants could also apply for consolidation. Therefore, we find that there was no bona fide reason for not applying for summons for directions.

After considering the history of the case, as did the learned judge, we are of the view that the learned judge was justified in exercising his discretion to strike out the action. For ourselves, we cannot find any reason to interfere with the exercise of that discretion. We dismissed the appeal with costs and ordered the deposit to go to the respondent to account for costs.

Appeal dismissed.

Reported by David Lai